UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re BRIDGESTONE/FIRESTONE, INC. ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	Master File No. IP 00-9373-C-B/S MDL No. 1373
THIS DOCUMENT RELATES TO ALL ACTIONS	

DEFENDANTS' REPLY TO PLAINTIFFS' SUBMISSION REGARDING PROPOSED CASE MANAGEMENT ORDER

Defendants Bridgestone/Firestone, Inc. ("Firestone"), Bridgestone Corp. ("Bridgestone"), and Ford Motor Company ("Ford") (collectively "Defendants") respectfully submit this reply to "Plaintiffs' Submission Regarding Case Management Order" (filed Dec. 22, 2000) ("Pl. Sub.") to clarify several issues regarding Defendants' proposal for federal court-state court coordination.

In their Submission, Plaintiffs characterize Defendants' coordination proposal as an "unprecedented" and "bureaucratic" plan that is "ill-suited to the circumstances of this litigation" and "would frustrate the purposes of this MDL proceeding by delaying discovery." (Pl. Sub. at 2.) Plaintiffs also argue that judicially supervised coordination would violate the Anti-Injunction Act and that coordination is, in any event, improper here, because the state court cases are "mature." (*Id.* at 8-10, 14-15.) Defendants respectfully submit that these contentions are unfounded.

First, Defendants' proposal for judicially supervised federal-state coordination is supported by both common law and common sense. Plaintiffs attempt to suggest that the notion of court-sponsored coordination between federal and state courts is a newfangled,

frivolous idea. That suggestion is belied by the fact that the task force recently authorized by Chief Justice Rehnquist to review mass torts litigation issues focused considerable energy on the problems that arise where federal-state court coordination of pre-trial activities is not achieved. Indeed, the lack of a ***mandatory, automatic*** coordination mechanism was cited in the task force's materials as a major problem: "Limits on the reach of the federal multidistrict litigation procedure have allowed plaintiffs' attorneys to avoid federal discovery controls by filing cases in state courts." REPORT OF THE ADVISORY COMM. ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, Appendix C, at 16 (Feb. 15, 1999) ("TASK FORCE REPORT").

A key solution identified in the task force materials is the increasingly common practice of "voluntary" coordination of pre-trial activities in federal and state courts:

> In general, the state and federal judges who coordinated their activities found the experience to have promoted "economy, efficiency, and consistency." Conditions for effective coordination include appropriate, usually early, timing of the initial contact, often by the federal judge; maintaining continuous contact throughout the pretrial process; establishing a personal working relationship with the other judges; and enlisting the aid of the attorneys in identifying related cases and cooperating with each other.

Id. at 58 (citations omitted). The report further notes that "[i]n a cooperative effort at the national level, the Federal Judicial Center, the National Center for State Courts, and the State Justice Institute have published a manual to guide state and federal judges in their relations with each other in a variety of cases." *Id.* at 59 (citing MANUAL FOR COOPERATION BETWEEN FEDERAL AND STATE COURTS ("COURTS MANUAL") (Federal Judicial Center 1997)).

As noted in Defendants' Comments Concerning The Proposed Case Management Order (filed Dec. 22, 2000) ("Def. Comments"), there are numerous examples of federal and state courts engaging in the sort of pretrial coordination Defendants propose:

- In *In re Beverly Hills Fire Litigation*, the federal and state court judges coordinated all scheduling and pretrial activity.

- In *In re Air Crash Disaster Near Chicago, Ill. Litigation*, the state and federal court judges devised a joint discovery program and exchanged information pertaining to settlement efforts.

- In the Ohio asbestos cases, the federal and state court judges coordinated litigation of about 130 cases, with the state court tracking the federal court's formal case management plan.

See William W. Schwarzer, *et al., Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1701-07 (1992) ("Schwarzer") (setting forth case histories of coordination efforts in a number of mass tort and fraud cases).

Plaintiffs' suggestion that most of the coordination examples cited by Defendants involved coordination without judicial involvement is simply wrong. In each of these cases, the federal and state court judges worked together to effectuate coordination and issued orders setting forth the parameters of such coordination. For example, in *In re Air Crash Disaster At Sioux City, Iowa*, the federal court judge issued several orders regarding coordination with the related state court cases. *See, e.g.*, Order (dated Nov. 27, 1989) ("This Court shall coordinate these proceedings with the parallel Sioux City disaster cases pending . . . in the Circuit Court of Cook County. Counsel are requested to identify any state court judges handling other cases arising from the Sioux City disaster, so that coordination efforts can be made.") (cited in COURTS MANUAL at 19). Similarly, in the *Brooklyn Navy Yard Asbestos Litigation*, the federal and state court judges issued complementary case management plans and coordinated their motion rulings and all other pretrial matters. Schwarzer, 78 VA. L. REV. at 1704-05.

Plaintiffs' skepticism about the benefits of coordination is not shared by the many judges who have written or commented extensively about the benefits to be gained from federal-

state coordination. In preparing his article, Judge Schwarzer interviewed state and federal judges who had been involved in coordinated litigation to find out why they decided to pursue coordination and whether their efforts had been successful. Based on these interviews, Judge Schwarzer found that judges "attempted intersystem coordination because they believed it would promote economy, efficiency, and consistency," and that looking back after the cases had been resolved, the judges felt these goals had indeed been achieved. *Id.* at 1732. The federal and state court judges interviewed by the authors of the COURTS MANUAL similarly lauded the benefits of federal-state court coordination. As one judge put it, "What conceivable sense is there in having… lawyers appearing in two separate courts doing the same thing twice?" *See* COURTS MANUAL at 23.

Far from being risky or revolutionary, Defendants' coordination proposal is a commonsense approach for minimizing waste and expediting litigation. It makes no sense to do something twice (or, in this case, 200 times) when doing it once will suffice.

Second, Plaintiffs' suggestion that "effective coordination" will be achieved without judicial involvement is unrealistic. Plaintiffs' optimism about counsel's ability to achieve coordination without judicial involvement is not supported by the reality of this (or any other) litigation.[1] Indeed, it is clear that what Plaintiffs want is ***one-sided*** coordination – that is, coordination only where it provides them strategic advantage. As is detailed below, they wish to ensure that any useful discovery or favorable discovery ruling obtained by a plaintiff in any case inures to plaintiffs' benefit in all cases. But, at the same time, they wish to remain totally free to

[1] Notably, while Plaintiffs state that the "case law is clear that voluntary coordination is a desirable objective" (Pl. Sub. at 14), they fail to provide any actual case law supporting their dubious proposition that voluntary efforts would be more effective than judicially supervised coordination. In contrast, Defendants cited several cases in their Comments in which the MDL Panel has aptly noted that coordination is not effective when left to the devices of plaintiffs' counsel. (*See* Def. Comments at 5-6.)

proceed separately whenever they see advantage in doing so (*e.g.*, posing redundant discovery requests, noticing executive level depositions over and over again in efforts to pressure settlement, and relitigating discovery issues in multiple courts until they get the result they wish). Indeed, many state court cases that are candidates for coordination remain in state court precisely because plaintiffs' counsel in those cases sought to avoid this coordinated proceeding. Presumably, those attorneys will find it advantageous to compete against the federal cases during the pretrial phases of this litigation and will not be amenable to coordination unless encouraged by a state court judge.

Though Plaintiffs' counsel have assured the Court that they are "engaged in effective coordination with counsel in the related state court actions" (Pl. Sub. at 2), the record indicates to the contrary. For example, within the past month, Firestone and Ford received discovery requests in a nationwide putative class action brought in Illinois that has now been remanded to Illinois state court. (*See* Pl. First Set Of Interrogs. And Req. For Produc. Of Docs., *Rowan v. Ford Motor Company*, No. 00-L-667 (Cir. Ct. of the 20th Jud. Cir., St. Clair County, Ill.) (attached at Tab 1).) Those discovery requests were made even though plaintiffs' counsel in that case were well aware of the pendency of this proceeding. Indeed, on the very same day the discovery requests were served, the plaintiffs' counsel in that case informed Defendants that Michael Hausfeld of Cohen, Milstein, Hausfeld & Toll, who co-chairs the MDL Plaintiffs' Liaison Committee in this litigation (which Plaintiffs tout as the source of the federal-state coordination efforts), would be serving as co-counsel in the *Rowan* case. (*See* Notice Of Association Of Counsel (dated Dec. 5, 2000) (attached at Tab 2).)[2] In sum, it is difficult to

[2] Although Plaintiffs represented to this Court the next day that none of the lawyers involved in the MDL Plaintiffs' management structure would be involved in competing state court cases, Defendants have not been served

fathom that the *Rowan* plaintiffs' counsel, who crafted their claims to avoid federal jurisdiction and sought an expedited remand from the U.S. District Court for the Southern District of Illinois as soon as Defendants removed the case, went to such great lengths to escape this proceeding so that they could voluntarily coordinate their state court case with the federal proceeding.

Plaintiffs' counsel in several of the state court personal injury cases have similarly indicated that coordination is not on their agenda. Last week, Ford and Firestone received a 12-inch stack of discovery requests from plaintiffs' counsel in several personal injury cases pending in Tennessee state court. Not only are those requests duplicative of each other, but they also substantially overlap with the discovery that Plaintiffs propose in this federal MDL proceeding. For example, in one of the Tennessee cases, the document requests to Firestone contained 302 specifications, and the two sets served on Ford contained a total of 375 specifications. (*See* Pl. First Req. For Produc. To Def. Bridgestone/Firestone, Inc. and Pl. First And Second Reqs. For Produc. To Def. Ford Motor Company, *Carrasco v. Bridgestone, Inc.*, No. 00C-2951 (Davidson County, Tenn.) (attached at Tab 3).) These specifications seek documents related to, *inter alia*, the engineering of the Firestone tires and Ford vehicles at issue, the relationship between Firestone and Ford, advertising by the defendants, NHTSA's investigation of Firestone tires, the manufacturing processes at Firestone's Decatur plant and any tire recalls conducted or considered by Firestone or Ford anywhere in the world. Not surprisingly, these requests overlap significantly with the requests that Plaintiffs recently offered as a preview of what they intend to seek in this MDL proceeding.

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with any notice indicating that Mr. Hausfeld has withdrawn from the *Rowan* case. In any event, he has not achieved discovery coordination in this instance.

The "do-it-yourself" coordination Plaintiffs apparently believe has been achieved is a chimera. Defendants are being barraged with onerous and duplicative discovery requests, demonstrating what should have already been obvious: Absent judicial sponsorship, there will be no real pretrial coordination among the pending cases. Instead, the parties will become bogged down in wasteful and duplicative exercises that will dramatically slow the resolution of these cases, to the detriment of all involved.

Third*, *Plaintiffs' extended argument about federalism and the Anti-Injunction Act is a red herring. Plaintiffs contend that Defendants' plan would "abandon the constitutional bedrock of federalism" and violate the Anti-Injunction Act by requiring this Court to "stay" the activities of state courts and by "impos[ing] this Court's authority over other courts." (Pl. Sub. at 4, 8-12.) These arguments grossly mischaracterize Defendants' proposal. While Defendants urge that this Court reach out to state courts to achieve coordination of the discovery phases of the federal and state court litigation, Defendants nowhere suggest that this Court should ***enjoin*** any state court litigation or otherwise strong-arm state court judges into coordination. Rather, Defendants propose that this Court engage in informal conversations with state court judges in an effort to reach agreement about how best to effectuate coordination that would be beneficial to litigants and courts in both forums. (Def. Comments at 11-12.)

Contrary to Plaintiffs' intimations, Defendants believe that most state court judges would be very receptive to the coordination proposed here. Indeed, state court judges have often actively sought coordination because they are loath to waste their limited resources on duplicative pretrial matters.[3] But if any state court judges decline, their cases will not be

[3] *See, e.g., In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 421 n. 6 (J.P.M.L. 1991) ("state court judges have communicated to the Panel that coordination among state courts and a single transferee court for the federal actions is an objective worthy of pursuit"); *see also* Schwarzer, 78 VA. L. REV. at 1706 (describing interview with

coordinated with the federal court proceeding. Defendants are not in any way suggesting that this Court should coerce state court judges into multi-jurisdictional coordination.

Finally, in accusing Defendants of disregard for the state court judges with tire-related cases, Plaintiffs appear not to have read all "32 paragraphs" of Defendants' "excessive and overly-structured" plan. (Pl. Sub. at 4.) Far from trampling on the "constitutional bedrock of federalism" (*id.*), Defendants' proposed Case Management Order ("Proposed CMO") painstakingly details that the state courts will retain full jurisdiction over their cases:

- "The State Court will retain its full jurisdiction over [a] Coordinated State Court Case and will conduct the trial of any and all contested issues in the matter. The [federal] MDL Court will have no jurisdiction over proceedings" in such a case. (Proposed CMO § IV.B)
- "All merits issues arising in [a] Coordinated State Court Case will be decided by the State Court, including any motions to dismiss, motions for summary judgment, or the like." (*Id.*)
- "None of the orders issued by the MDL Court in the MDL . . . proceeding will control or otherwise apply to the State Court Personal Injury Case (except to the extent that those orders govern the conduct of the MDL proceeding itself) or be dispositive of any issues in [that] case." (*Id.*)

Fourth, Plaintiffs' repeated references to "mature" state court litigation are simply not supported by the record. Over the past several months, Plaintiffs have repeatedly stated that the tire-related personal injury cases constitute "mature" claims. (*See* Pl. Sub. at 2, 8, 9, 14-16.) With those "maturity" references, Plaintiffs appear to be arguing (a) that the Court should not undertake coordination because the state court cases are ready for trial and (b) that Defendants' coordination plan would therefore slow down (not expedite) their resolution. (*Id.* at 14-16.) In reality, only one case alleging defects in the subject tires has actually proceeded to

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Judge J. Charles Thompson, Eighth District Court of the State of Nevada, in which he explains that he pursued coordination in a series of cases stemming from a catastrophic fire in order "to prevent the 'great duplication of effort and money' that would result 'if both court systems were going to conduct discovery and hold hearings and . . . settlement negotiations'").

trial.[4] The vast majority (90 percent) of the state court personal injury cases and all of the state court class actions were filed ***after*** the August 2000 recall announcement and are thus ***less than five months old*** (and therefore presumably remain in their pleading/early discovery phase). Indeed, more than 25 percent of these cases were filed ***after*** the creation of this MDL proceeding on October 24, 2000. If plaintiffs in those cases are ready for trial, it is unclear why they are serving Defendants with onerous discovery requests, including requests for numerous depositions. Further, if this litigation is so "mature," it is unclear why Plaintiffs in this proceeding have foreshadowed a substantial discovery effort.

Fifth, Plaintiffs should not be allowed to eschew any formal coordination of discovery and then demand the benefit of improper privilege rulings by state court judges. Despite their strong opposition to any judicially supervised coordination and their ostensible concerns about judicial federalism, Plaintiffs have no trouble asking that this federal Court abdicate its right to rule on discovery issues in the MDL proceeding and bind itself to state court decisions on privilege issues. Indeed, Plaintiffs feel so strongly about this provision that they seek to include it in the CMO ***twice*** – once in the coordination section and once in the discovery section. (*See* Proposed CMO §§ IV, IX.G.) Plaintiffs' proposal would undermine coordination instead of promoting it, by giving plaintiffs the incentive to litigate privilege disputes in one court after another until they find a court that rules their way. This Court should not endorse a proposal that would allow Plaintiffs to pick and choose among judicial rulings in order to ensure that they benefit from the most lenient rulings in state court, while they reject real coordination between federal and state courts that is conducted for proper (and not self-serving) purposes.

[4] That case, *Greenwald v. Bridgestone/Firestone, Inc.*, No. CV95-03064 (Maricopa County, AZ), resulted in a defense verdict.

In sum, this Court has a golden (but fleeting) opportunity to expedite resolution of this litigation and, at the same time, establish a federal-state court coordination model that will benefit future litigants. Contrary to Plaintiffs' suggestions, the pending tire cases are well suited for the type of federal court-state court coordination that Defendants propose. All involve similar core allegations, the same core defendants, and similar core discovery. The vast majority were filed almost simultaneously (that is, in the five months since Firestone announced the tire recall), and few have progressed beyond the initial pleading stage. The vast majority of the state court cases (158 out of 210) are pending in just three states – Texas, California and Florida – and as Defendants informed the Court last month, they are seeking to transfer cases to a limited number of courts within each state to limit the number of points of coordination that will be necessary. Defendants have filed motions in California and Texas seeking to consolidate many of these cases for pretrial proceedings and are seeking to centralize the Florida cases within each county.[5] One of these motions has already been granted – on December 22, 2000, Judge Darrell Hester granted Defendants' motion to appoint one judge to preside over pretrial matters in the Fifth Administrative Judicial Region in Texas. The other motions will be heard in short order.

Without question, coordination of these cases at this early stage will "reduce duplicative discovery, minimize the resource expenditures associated with discovery for both parties, effectively manage judicial caseloads, and enhance the likelihood of …settlements." COURTS MANUAL at 16. But the opportunity for such coordination is fleeting. Soon, the state court cases will begin to proceed in competition with the federal cases, defendants will be bogged down with onerous, overlapping discovery requests emanating from hundreds of

[5] (*See* Notice Of Filing Of Motions Seeking Coordination Of State Court Firestone Tire-Related Litigation In Texas And California (filed Dec. 22, 2000).)

different cases, plaintiffs' counsel in the federal and state court cases will compete for strategic advantage instead of coordinating for expedited resolution of their cases, this Court and numerous state courts across the country will toil duplicatively on the same discovery issues, and the opportunity to achieve meaningful coordination will be lost.

Dated: January 3, 2001

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